Supreme Court, U.S.
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No. 92-1441

In The

Supreme Court of the United States

October Term, 1993

HAROLD E. STAPLES, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Whether, when enacting 26 U.S.C. § 5861(d) and 26 U.S.C. § 5845 of the National Firearms Act, and 18 U.S.C. § 922(o) (Supp. 1992), Congress intended to create a strict liability crime whereby the government must only prove that the defendant knew the device he possessed was a gun in the general meaning of that term to secure a felony conviction for "knowing" possession of an unregistered "machinegun" in violation of the National Firearms Act.

LIST OF PARTIES

The petitioner is Harold E. Staples, III, a resident of the State of Oklahoma. The respondent is the United States of America.

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 971 F.2d 608 (10th Cir. 1992) and reprinted in the Appendix to the Petition For A Writ of Certiorari (hereinafter "App.") at 1a-31a. The judgment denying Petitioner's Petition for Rehearing is unpublished and is reproduced in App. 32a-33a. The judgment and sentence of the United States District Court dated February 20, 1991 is unpublished and is reproduced in App. 37a-43a. The Order denying Petitioner's Motion for Judgment of Acquittal is dated February 1, 1991, and is reproduced in App. 34a-36a. This Honorable Court's Order granting Petitioner's Petition for a Writ of Certiorari was entered May 24, 1993.

JURISDICTION

On August 3, 1992, the United States Court of Appeals for the Tenth Circuit affirmed the felony conviction of Harold E. Staples, III. On November 4, 1992, the Court of Appeals denied Mr. Staples' Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Petition for a Writ of Certiorari was filed on March 4, 1993 and the Court granted the Petition on May 24, 1993.

STATUTES INVOLVED

This case involves the following statutes:

18 U.S.C. § 922. Unlawful acts

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to –

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

* * *

26 U.S.C. § 5845. Definitions

For the purpose of this chapter –

(a) Firearm. – The term "firearm" means . . . (6) a machinegun; . . . The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun. – The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun can be assembled if such parts are in the possession or under the control of a person.

* * *

26 U.S.C. § 5861. Prohibited acts

It shall be unlawful for any person –

* * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

* * *

26 U.S.C. § 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

A. Pre-Trial Events

This criminal action was commenced against one defendant, Harold E. Staples, III (hereinafter referred to as "petitioner") by way of Indictment filed on July 12, 1990. The indictment charged the petitioner in Count One with *knowingly* receiving and possessing two firearms both of which had been allegedly modified so as to be machineguns in violation of 26 U.S.C. § 5861(d).

The indictment filed in this case was based on the fruits of a search of the petitioner's home on December 29, 1989. Law enforcement officers representing the City of Jenks, Oklahoma Police Department and the Bureau of Alcohol Tobacco and Firearms (hereinafter "ATF") conducted a search of the petitioner's home and seized an M-1 rifle and an AR-15 semiautomatic rifle, a rifle bolt of unspecified nomenclature and manufacture, and a Beeman 552, 3 x 21 scope. The firearms of which the petitioner was charged with "knowing possession" were an M-1 .30 caliber World War II Carbine Rifle (hereinafter

the "M-1")[1] and an SGW .223 caliber model X M14A1 semiautomatic Rifle (minus certain parts and hereinafter referred to as the "AR-15").

B. Characteristics of the AR-15 Semiautomatic Sport Rifle

The AR-15 rifle is a civilian, semiautomatic version of the United States Military M-16 standard issue rifle. There are certain differences between the component parts of the fully automatic M-16 and its legal counterpart, the semiautomatic AR-15 rifle. Five parts used in the manufacture of these two rifles come in both "automatic" and "semiautomatic" versions: the bolt carrier, the selector switch, the trigger, the disconnector, and the hammer. Although an AR-15 can be assembled with the fully automatic versions of the bolt carrier, selector switch, trigger, disconnector, and hammer, the gun is still not capable of fully automatic fire without one additional part, the "sear" or "auto-sear." Thus, the exclusively semiautomatic versions of the bolt carrier, selector switch, trigger,

---

[1] The M-1 belonged to Harold E. Staples, Jr., the petitioner's father. The M-1 was brought home by Mr. Staples from his duty in World War II. (Tr. pp. 358-359). At trial, Mr. Staples testified that he was burglarized years earlier and the police had the M-1 in the "stolen property room" at the police department. (Tr. p. 361). Upon verifying ownership of the M-1, Mr. Staples then registered it with the government. It was uncontested that the National Firearms Registry showed that the M-1 was lawfully registered to Harold E. Staples, Jr. (Tr. pp. 57-59, Aplt. App. #Y, pp. 583-585). (Tr. p. 362) At his son's trial, Mr. Staples testified that he left the gun at the petitioner's home when he would be away for a few days. (Tr. p. 364). When the M-1 was seized, the petitioner was unaware the M-1 had been brought to his home by his father. (Tr. p. 373, Aplt. App. #K, p. 184). The petitioner was found not guilty of "knowing" possession of the M-1.

disconnector and hammer are called "AR-15 parts," while the *not exclusively* fully automatic parts of the same nomenclature are sometimes referred to as "M-16 parts." The sear, or auto-sear, has no semiautomatic counterpart and therefore, in all cases, would be an M-16 part.

Despite this difference between "M-16" parts and "AR-15" parts, many of the "after-market" manufacturers of civilian, semiautomatic models of the M-16/AR-15 have made and sold large numbers of the AR-15's out of M-16 fully automatic parts, that is, with the fully automatic or "M-16" version of the bolt carrier, selector switch, trigger, disconnector, and hammer. (Tr. pp. 304-306, Aplt. App. #O, pp. 228-230).[2] The reason is that the market became flooded with surplus (actually military-rejected) fully automatic "M-16" parts, and it was less costly to construct civilian AR-15's from those "M-16" internal parts, rather than to construct the AR-15 from specially made and more expensive semiautomatic "AR-15" parts. (Tr. p. 112, Aplt. App. #Q, p. 302). The AR-15 which is the subject of this action contains these common *internal* M-16 parts. (Tr. p. 95, Aplt. App. #Q, p. 285). The government's expert, a ATF enforcement officer, Agent McLaughlin, conceded at trial that the AR-15 rifles containing internal "M-16" components are still legal semiautomatic AR-15 rifles provided they are not equipped with the sear or auto-sear.[3] (Tr. p. 109, Aplt. App. #Q, p. 299).

---

[2] "Aplt. App." refers to the Appellant's Appendix which is a two volume set filed in the Tenth Circuit Court of Appeals in *United States v. Staples*, Case No. 91-5033.

[3] It was undisputed that there was no auto-sear seized nor had this AR-15 been modified to accommodate an auto-sear. (Tr. pp. 191-193, Aplt. App. #Q, pp. 325-327).

Even though, upon seizure, the AR-15 at issue was inoperable, absent critical parts and in a state of disrepair, the government prosecuted Mr. Staples for possession of an unregistered firearm. The fact of the matter is, and the ATF enforcement officer again conceded, that the AR-15 was and is not a registerable weapon pursuant to the National Firearms Act. This AR-15 at issue was not registerable because it was not equipped for an auto-sear, the essential registerable component which in and of itself would convert the AR-15 to a machinegun. The Registry did not and would not consider such a weapon a machinegun for registration purposes. ATF enforcement Officer McLaughlin testified:

> Q. (By Mr. Brewster) Could Mr. Staples have registered the AR-15 with the five M-16 parts in?
>
> A. No, sir.
>
> Q. So, the day before his house was searched, he couldn't have even registered the gun then?
>
> A. No, sir.
>
> Q. The gun wasn't registerable by him, was it?
>
> A. No, sir.
>
> Q. So he couldn't have complied with what you charged him with by registering the gun on December the 28th, could he have?
>
> A. Sir, I didn't charge him with anything.
>
> Q. What the government charged him with that you're testifying about. The day before anything ever happened, he couldn't have complied with the law if he wanted to, could he?
>
> A. No, because the law was amended on May, 1986 which forbade the private ownership of newly manufactured machine guns to civilians.
>
> Q. If he owned the gun prior to 1986 and it fired in semiautomatic fashion but owned it after that act that you're talking about, how could – he couldn't register it, could he?

> A. Well, something obviously happened to the weapon from the time that he owned it until the time it was seized. Because if it was semi-automatic before May 16th, 1986, there would have been no need to register it because it was a legal legitimate firearm.
>
> Q. He could have lawfully possessed it prior to the act taking effect?
>
> A. Certainly, as long as it didn't function automatically, no problem.
>
> Q. But if it then functioned automatically through this hammer follow down concept after 1986, he couldn't register it, could he?
>
> A. No. Because at that point, sir, it was contraband.
>
> Q. So if this hammer down follow effect occurred – I'm just trying to understand – after 1986, he is literally in possession of a gun he can't do much about?
>
> A. That's correct, ***other than once he discovered the condition that it would fire automatically, it's his responsibility to have it properly repaired, have the parts in it replaced with the appropriate AR-15 parts.***
>
> Q. Do you know whether he ever discovered that condition?
>
> A. I have no knowledge of that, sir. (Emphasis added).

(pp. 217-219, Aplt. App. #Q, pp. 351-353).

The government's evidence that this AR-15 fired multiple shots with a single trigger pull (not automatically) was revealed after this once disassembled, dirty, inoperable "firearm" was assembled with different parts, cleaned and oiled thoroughly and fired with soft primer ammunition. The weapon was reassembled by the government with a bolt carrier which was not the bolt that

originally fit this AR-15. (Tr. pp. 221-231, 378-391, Aplt. App. #Q, pp. 355-365 and #K, pp. 189-192). After these "adjustments" were made by the government agents, and after the gun was seized, the gun, when fired by the ATF Agent McLaughlin, malfunctioned to sporadically shoot multiple shots with a single trigger pull. (Tr. pp. 221-231, 102-104, Aplt. App. #Q, pp. 355-365 and pp. 292-294). The government's best theory arguing the guilt of the petitioner was that the AR-15 could now malfunction to fire "fully automatic" because the AR-15 was modified in that the metal "stop" on the "auto" to "semi" selector switch was worn or filed down and thus the gun was enabled to misfire sporadically. (Tr. pp. 185-189, Aplt. App. #Q, pp. 318-323). At trial, the government failed to link this alleged modification of the selector switch to the petitioner. Further, as discussed more fully herein, the petitioner testified that he did not know, nor did he have reason to know, that the "stop" was filed down or worn.

The selector switch on the side of the semiautomatic AR-15 was intended for use on an M-16. On M-16's which are manufactured with an auto-sear and are, by definition, machineguns, this selector switch enables the user to chose either semiautomatic or automatic fire. Thereafter, the M-16, *by function of the auto-sear*, fires, reliably and by design, more than one shot with a single pull of the trigger. Literally tens of thousands of the AR-15 semiautomatic sport rifles in use have this M-16 selector switch because many civilian version AR-15's were manufactured with surplus M-16 parts, excepting the auto-sear. Of course, the selector switch in the exclusively semiautomatic AR-15 is useless in any mode other than the semiautomatic because the gun is not designed or equipped for automatic fire without one essential component – the auto-sear. In fact, when these surplus M-16

selector switches are found on the civilian AR-15, this switch usually has a metal bump or protrusion referred to as a "stop" that acts to prevent the selector switch from rotating to automatic mode. AR-15 semiautomatic sport rifles with M-16 selector switches are in the closets of thousands of citizens. These sport rifles are openly sold at gun shows across America to innocent purchasers who are unaware, as was the petitioner, that they are at risk of prosecution and substantial penalties that accompany felony crimes.

C. The Jury Trial of the Petitioner

A jury trial of the petitioner commenced December 17, 1990. The petitioner called two experts to testify in his defense, one of whom was Bill Fleming, a local manufacturer and dealer of machineguns. Mr. Fleming was often called upon by law enforcement as a consultant. (Tr. pp. 302-303). Mr. Fleming testified that AR-15 rifles with internal M-16 components will not fire "automatically more than one shot with a single pull of the trigger" but that "occasionally you will get a malfunction" which results in two or three shots firing with a single pull of the trigger. (Tr. pp. 305-306, Aplt. App. #O, pp. 229-230). Mr. Fleming further described what measures can be taken to allow an AR-15 to malfunction causing sporadic fire of more than one shot with a single trigger pull, such as down loading the magazine, use of special ammunition and a thorough cleaning and oiling of the rifle. (Tr. p. 307, Aplt. App. #O, p. 231). Mr. Fleming further testified that a worn or filed off selector switch does not make an AR-15 into a machinegun. (Tr. p. 310, Aplt. App. #O, p. 234).

This malfunction of the AR-15 with internal M-16 components known as "hammer follow through," "hammer follow down" or "slam down," was solely relied

upon by the government as evidence that the subject AR-15 was a machinegun. This malfunction was clarified by Mr. Fleming and further elaborated on direct examination by Mr. Charles Fagg, the petitioner's additional expert witness. Mr. Fagg is a firearms' engineer having received his bachelor of sciences degree from the University of Texas at Austin. Mr. Fagg was employed by the government from 1957-1979 following his naval service. (Tr. p. 322). Mr. Fagg worked for the Department of the Army as an engineer on the technical staff of "Project Manager Rifles." The purpose of this project was to introduce M-16's into the Army. Mr. Fagg's testimony demonstrates his extensive knowledge of the M-16: "I have done many studies dealing with the M-16. There is probably not a part on the M-16 that I have not done some form of study on." (Tr. p. 323). Mr. Fagg described the malfunction known as "hammer-follow down" as follows:

Q (By Mr. Brewster) Sir, as the weapon presently exists, does the subject weapon shoot automatically?

A It malfunctions to produce multiple shots. I could not call it automatic fire by any stretch of the imagination.

Q What is happening to cause it to fire more than one shot?

A When the selector lever is placed in the automatic fire position, what would be the automatic fire position, it depresses the tail of the disconnector. And when that occurs, when the bolt carrier comes to the rear, it cocks the hammer into the cocked position, and then as the bolt carrier moves back forward, instead of being retained and then later striking the primer below, it simply follows its cam cocking surface, its cocking cam surface, it follows it back into position and rests against the firing pin so that

the inertia of just the firing pin and this hammer, which is now slowed considerably, on some ammunitions the primer will be sensitive enough that will fire it.

Q And what is that called, sir?

A That is called a follow down malfunction.

(Tr. pp. 326-327, Aplt. App. #P, pp. 251-252). The prosecution expert, ATF enforcement Officer McLaughlin, conceded that when hammer follow down occurs, the AR-15 is not *reliably* firing multiple shots with a single trigger pull. (Tr. pp. 194-198, Aplt. App. #Q, pp. 328-332).

Additionally, the petitioner presented evidence at trial below that the subject AR-15 fired only semi-automatically in years 1983, 1984, 1985, 1986, 1987, 1988 and until seizure by the government in 1989. The Tenth Circuit decision in *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992) makes no mention of this critical testimony which is set forth in the Addendum to the Statement of the Case at p. 13.

At the close of evidence, Mr. Staples' jurors were instructed as follows:

Essential Elements of the Crime (26 U.S.C. § 5861(d))

In order to establish the offense charged in the indictment, each of the following essential elements must be proved beyond a reasonable doubt:

First: that the defendant knowingly possessed the firearm described in the Indictment; and

Second: that such firearm was not registered to the defendant in the National Firearms Registration and Transfer Record.

The unlawful offense is complete when the two separate elements just stated are proved.

Knowingly to Possess

A person is knowingly in possession if his possession occurs voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word knowingly was to insure that no one would be convicted of possession of a firearm if he did not intend to possess it.

The Government need not prove that a defendant knows he is dealing with a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril.

Mere Possession of Unregistered Firearm

Mere possession of an unregistered firearm is a violation of the law of the United States. *It is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed it.* (Emphasis added.)

The petitioner was convicted of knowing possession of an unregistered "machinegun" (the AR-15) on December 19, 1990. Petitioner's Motions for Judgment of Acquittal were overruled by the trial court by written order filed February 1, 1991. (App. 34a-36a).

D. Post-Trial Events

On February 20, 1991, the trial court entered its judgment and imposed a suspended sentence, placing the petitioner on probation for five years, requiring him to dispose of all guns and refrain from possessing guns of

any kind, and fining him $5,000.00 and a $50.00 monetary assessment. (App. 37a-43a.)[4]

Petitioner filed his timely Notice of Appeal on February 22, 1991 and commenced his appeal to the United States Court of Appeals for the Tenth Circuit. On August 3, 1992, the Court of Appeals affirmed the conviction. (App. 1a-31a.) On August 17, 1992, the petitioner filed his Petition for Rehearing with Suggestion for Rehearing *en banc*, which the Court of Appeals denied on November 4, 1992, affirming its initial decision. (App. 32a-33a).

On March 4, 1993, petitioner filed his Petition for a Writ of Certiorari before this Court.[5] On May 24, 1993, the Petition was granted.

ADDENDUM TO STATEMENT OF THE CASE

The following testimony was presented at trial in defense of the petitioner.

From the petitioner, Harold E. Staples, III: (Tr. pp. 374-384, Aplt. App. #K, pp. 185-195).

Q. (By Mr. Brewster) Sir, in connection – reviewing this document, can you tell the ladies and gentlemen precisely when you purchased the AR-15?

A. It is dated here 4/9 of 1983 . . .

Q. Did you have the occasion to fire the weapon after you purchased it?

A. Yes, sir . . .

Q. Now, tell the ladies and gentlemen of the jury about the occasion you had to fire the weapon.

---

[4] Petitioner filed two Motions to Stay Execution of Sentence pending appeal. Both Motions were granted. (Tr. Docket Nos. 71 and 79).

[5] Petitioner was granted an extension of time to file his Petition for a Writ of Certiorari on January 22, 1993.

A. In fact, it was the very day that I purchased it. I left – I believe at that time I went to my father's residence which is in Okmulgee County, rural area. I picked up some ammunition at the gun show. Being excited about buying it, I couldn't wait till I could get there and shoot it. I was very disappointed when I got to my father's farm. The gun wouldn't function. It would not function properly in the semiautomatic mode. The gun was defective in some way.

Q. Well, describe for the ladies and gentlemen of the jury the experience of firing it, what occurred.

A. Okay. I loaded the clip. I put the clip in. I put a shell into the rifle, fired it. It would not inject the other – the next shell. I tried it, I don't know how many times. Many, many times. It would not inject the shell. I did not know anything about the rifle or any way of fixing it or anything else. Basically, I was very disappointed.

Q. All right. Did you shoot the weapon after that first day that you shot it, the day you purchased it?

A. Yes, sir. Sometime later I had shot it at different intervals of time and it functioned just the exact same way . . .

By David Seabolt: (Transcript of Jury Trial, 12/17/90, pp. 290-295, Aplt. App. #L, pp. 206-211).

Q. (By Mr. Brewster) David, let me hand you what has been marked and received into evidence as plaintiff's Exhibit Number 2 and ask you to look at it closely. Do you recognize that weapon?

A. Yes, sir.

Q. Is that the weapon you shot?

A. Yes, sir. I have shot this weapon.

Q. When did you shoot that weapon?

A. I have shot it numerous occasions.

Q. Over what period of time, do you know?

A. Since the weapon was purchased. I couldn't say how many times I have shot it.

Q. Was there ever a time when you considered that weapon to be your own?

A. Yes, sir. This weapon was mine.

Q. Explain to the ladies and gentlemen of the jury.

A. My Uncle Hal bought this weapon, and he couldn't get it to function right. So we couldn't get it to function right, so he gave it to me on the stipulation I could get it to function right. So I took it, and I took it home. My dad worked on it, and we couldn't get it to work right, and – but it was mine, I mean.

Q. Describe for the ladies and gentlemen of the jury what would happen when you would shoot the weapon that you have in your hands, Plaintiff's Exhibit Number 2?

A. You – when you would pull the trigger, it would fire, and that would be it. You would have to pull the charging handle. It would eject, load another shell, fire again. That is the only way it would shoot.

Q. How many times would you say you've fired it?

A. I have fired this at least 1000 rounds.

Q. How many times would you say young Brian[6] had fired it?

A. At least three to 400 rounds.

Q. How many occasions would you and Brian go and fire the weapon?

A. Whenever we would skip school or after school or whenever we could get a chance, that's when we went and did it.

Q. Where did you get your ammunition?

A. Anywhere we could we get it. Brian brought a lot of it. He would take from his dad's garage. We would buy it at stores. I have bought some at the gun show. Just anywhere we could get it, we got it.

Q. Did you ever learn that, David, from experimentation with the gun, how to make the gun shoot better than you have described for the ladies and gentlemen of the jury?

A. Well, we experimented a lot. We would take the AR-15 that Brian brought down there, Mr. Jobson's, and we would take parts and interchange them, trying to make it fire better.

Q. Did you ever – were you ever – did you ever accomplish –

A. We got it to fire decent, you know, semiautomatic. It would still jam every once in a while, you know, but it never fired fully automatic.

Q. What did you do to improve its semiautomatic capability? What did you do? You said you changed parts. Was there any part –

A. We would change the bolt. It's easy accessible, just change the bolt out.

---

[6] "Brian" refers to Brian Jobson, son of ATF Agent Lewis Jobson. Agent Jobson was the case agent assigned to the *Staples* prosecution and sat at the prosecutor's table throughout trial.

Q. And did that help it?

A. It fired – it would fire four or five times semiautomatic, and then it would jam up again.

Q. Did it ever shoot more than one shot when you pulled the trigger, David?

A. No, sir.

Q. Ever?

A. Not – not me, no, sir.

Q. Did you ever try to make it?

A. No, sir.

Q. Do you know, in your presence did anyone else ever pull the trigger and have it fire more than once?

A. Not in my presence, no, sir.

Q. Did your Uncle Hal ever shoot it in your presence?

A. Yes, sir. We shot it.

Q. Did it ever fire more than one shot when he fired it?

A. No, sir.

By Brian Jobson: (Transcript of Jury Trial, 12/17/90, pp. 368-370, Aplt. App. #M, pp. 215-217).

Q. (By Mr. Brewster) Brian, let me direct your attention to – at a time somewhere in, let's say, '86 to, let's say, '89. Did you ever have occasion to shoot guns with a young man named David Seabolt, a young man named Chris Peak?

A. Yes, I did.

Q. Did you ever shoot a weapon known as an AR-15?

A. Yes, I did.

Q. And did you have many occasions with those boys to go out and shoot guns?

A. Several.

Q. All right. Did you know whether David had an AR-15 that he maintained as his own gun?

A. He had in his possession one.

Q. Did you ever have an opportunity to shoot it?

A. Yes, I did.

Q. All right. Would you recognize that gun if you looked at it?

A. Maybe.

MR. BREWSTER: Your Honor, may I approach the witness, please?

Q. (By Mr. Brewster) Brian, let me hand you what's been marked and received into evidence as plaintiff's Exhibit Number 2. That is an AR-15, and I'd like you to look at it. Tell me if you can if you recognize the gun?

A. I can't positively identify it, but it is a very similar gun.

Q. Okay. If it was David's gun, would it have been the gun that you had an opportunity to shoot and see shot?

A. Yes.

Q. And the time span that I'm talking about would have been, let's say, '87, '88,-'89. Would that be consistent with your recollection?

A. Somewhere in there.

Q. All right. Would you describe for the ladies and gentlemen of the jury how that weapon shot when you shot it?

A. When I shot the weapon, it fired one shot, and then you'd have to work the action to eject the empty casing and load in a new casing.

Q. Did it ever, Brian, fire more than one shot with one pull of the trigger?

A. Not when I fired it.

Q. Did you ever see it fired in that fashion?

A. No, I did not.

Q. And the many times that you saw David fire it, did it fire in the same fashion as when you fired it, that being one shot and then lodging a bullet in the chamber?

A. Yes.

Q. Did it appear that it was malfunctioning?

A. Yes, it did . . .

Chris Peak corroborated this testimony by stating that in 1987 and 1988, "It fired semiautomatic where you pull the trigger, it would fire one time. About every three or four times, it would jam. That's the best of what I know." (Tr. p. 287, Aplt. App. #N, p. 222). The foregoing evidence, which was UNCONTROVERTED by the government establishes that the AR-15 malfunction, but fires at best semiautomatically until it was in the hands of the government in 1989.

SUMMARY OF ARGUMENT

The opinion of Tenth Circuit Court of Appeals in this case holds that no *mens rea* element is required to be proven in criminal prosecutions for violations of 26 U.S.C. § 5861(d). The opinion of the Tenth Circuit Court of Appeals thus considers violations of 26 U.S.C. § 5861(d) to be strict liability crimes. The sole issue before this Honorable Court is whether a defendant must have knowledge that the item he or she possesses is a "firearm" as that term is defined in 26 U.S.C. § 5845 to secure conviction under 26 U.S.C. § 5861(d).

Criminal offenses requiring no *mens rea* have a generally disfavored status. *Liparota v. United States*, 471 U.S. 419 (1985). 26 U.S.C. § 5861(d) omits any mention of scienter as an element of the offense. However, this Court

has held that "certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States v. United States Gympsum Co.*, 438 U.S. 422, 438 (1978).

There is a split in the Circuit Courts of Appeal on the issue raised in this case. However, those decisions which embark upon thorough discussion of statutory construction, common law principles and legislative intent have required the government to prove that the defendant knew the item possessed was a "firearm" as that term is defined in the National Firearms Act. *See, United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) (*en banc*); *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992) (per curiam).

The petitioner respectfully submits that the rule of lenity be applied by this Court in interpreting 26 U.S.C. § 5861(d) and that the ambiguity present in said statute should be resolved in favor of the petitioner.

ARGUMENT

THE EXISTENCE OF *MENS REA* IS AN INDISPENSABLE ELEMENT TO SECURE A FELONY CONVICTION FOR ALLEGED VIOLATIONS OF THE NATIONAL FIREARMS ACT

A. INTERPRETATIONS OF THE ELEMENT OF MENS REA IN PROSECUTIONS PURSUANT TO THE NATIONAL FIREARMS ACT

The term *"mens rea"* is rivaled only by the term "jurisdiction" for the varieties of senses in which it has been used and for the quantity of obfuscation it has created.[7] As Blackstone stated: "An unwarrantable act

[7] Kadish, Sanford H. *Blame and Punishment, Essays in the Criminal Law*, at p. 65 (Macmillan Pub. Co. 1987).

without a vicious will is no crime at all." The vicious will was the *mens rea*. Reduced to its essence it referred to the choice to do a blameworthy act. The requirement of *mens rea* was rationalized on the common sense view of justice that blame and punishment were inappropriate and unjust in the absence of that choice.[8]

The cases of this Court follow the "familiar proposition that 'the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *United States v. United States Gypsum Co.*, 438 U.S. 436 (1978). On numerous occasions, this Court has relied upon the words of Mr. Justice Jackson delivered in *Morissette v. United States*, 342 U.S. 246, 250-251 (1952):

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' (Footnotes omitted.)

[8] *Id.*

As stated by this Court in *United States v. United States Gypsum Co.*, 438 U.S. 436, 437 (1987).

> Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality . . . *intent generally remains an indispensable element of a criminal offense.* This is true in a sophisticated criminal antitrust case as in one involving any other criminal offense. (Emphasis added.)

The fundamentals of the *mens rea* element and its applicability to a National Firearms Act violation were explored by this Court in *United States v. Freed*, 401 U.S. 601 (1971). The *Freed* opinion has been the subject of great debate in the United States Circuit Courts of Appeal on the issue presented in this case. In *Freed*, the defendant was in possession of a hand grenade which he failed to register in violation of 26 U.S.C. § 5861(d). The defendant alleged that he did not know that hand grenades required registration. The trial court dismissed the indictment which neglected to contain an allegation of scienter. This Court stated that the National Firearms Act:

> is a regulatory measure in the interest of public safety which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act.

Freed, 401 U.S. at 609.

In his concurring opinion, Justice Brennan states, "this case does not raise questions of 'consciousness of wrongdoing' or 'blame worthiness.'" Justice Brennan specified the quantum of proof the prosecution must meet:

> The government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does hold that no intent at all be proven in regard to one element of the offense – the unregistered status of the hand grenades – knowledge must still be proven [that the defendant possessed items which items were hand grenades]. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements.

Freed, 401 U.S. at 612.

The *Freed* decision has been extensively relied upon by federal appellate courts in deciding the issue of scienter and its application, if any, under the National Firearms Act. Four Circuit Courts of Appeal have cited *Freed* for the holding that sufficient intent is established if the defendant is shown to have possessed an item which he knew to be a firearm in the general meaning of that term. *See Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977); *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987); *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987); *United States v. DeBartolo*, 482 F.2d 316 (1st Cir. 1973). In more recent decisions, federal courts of appeal have distinguished *Freed*, finding that "it may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of only certain kinds of firearms that it thought were highly dangerous." *See United States v. Anderson*, 885 F.2d 1251 (5th Cir. 1989) *(en banc)*; *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992); *United States v. Williams*, 872 F.2d 773 (6th Cir. 1989). In the Ninth Circuit Court of Appeals, a defendant who possesses a "firearm" whose external characteristics would *not* necessarily alert its owner to the likelihood of regulation, the government must prove knowledge that the gun was a firearm in the sense of the Act. *See United States v. O'Mara*, 963 F.2d 1288 (9th Cir. 1992); *United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983), *cert. den.*, 464

U.S. 821 (1983); *United States v. Kindred*, 931 F.2d 709 (9th Cir. 1991).

The Fifth Circuit Court of Appeals was the first circuit court to distinguish *Freed* in the *en banc* decision of *United States v. Anderson*, 885 F.2d 1251 (5th Cir. 1989). Joe Alvin Anderson was convicted of possession of unregistered firearms, including a .38-caliber "machine pistol," a .45 caliber pistol, and a silencer. Also seized by law enforcement were manuals giving step-by-step instructions for the conversion of semiautomatic pistols into fully automatic ones. *Anderson*, 853 F.2d at 313. The "modification" alleged by the government was of the .38 caliber pistol and consisted of "cutting, grinding or polishing a 'strip' magazine to convert the weapon from semiautomatic to fully automatic operation." *Anderson*, 853 F.2d at 315. The jury was instructed that to convict, they need only find that Anderson knew that the items he possessed were firearms within the general meaning of the term. Despite expressions of grave concern for innocent possessors of unregistered "firearms" the Fifth Circuit Court considered itself to be bound by the precedent of *United States v. Vasquez*, 476 F.2d 730 (5th Cir. 1973), *cert. den.*, 414 U.S. 836 (1973). The conviction was upheld.

The Court of Appeals then reversed Anderson's conviction in an *en banc* decision and stated as follows with regard to *Freed*:

> What the *Vasquez* panel overlooked is that the issue upon which it was pronouncing was not before the *Freed* court at all and that the expressions from that opinion on which it founded its position are not even dicta upon the question that we face today, but merely observations along the way to decision of a different issue entirely. That issue, as shown both by the somewhat cryptic opinion of the *Freed* Court and by the briefs of the parties in that appeal, summarized at 28 L.Ed.2d 1007 *et seq.*, was not the issue

> in today's case – which is whether the defendants could be convicted only if they knew what they possessed was a "firearm" in the Act sense or whether their knowledge merely that it was a firearm in the ordinary sense would suffice. Indeed, that neither was nor could have been the issue in *Freed*, for what the *Freed* defendants possessed was hand grenades; and hand grenades are not firearms in the general or dictionary sense at all. Such an issue was not before the Court, and the Court did not decide it. Indeed, it could not have done so, for – as is made embarrassingly clear by passages from the Government's *Freed* brief, quoted in the margin – the Government *conceded* that it had to prove that the item possessed was known to the defendant to be a "firearm" in the Act sense.[9]
>
> *Anderson*, 885 F.2d at 1252.

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[9] In footnote 6, the *Anderson* Court stated:

> At pages 7 and 8 of the "Brief for the United States" in *Freed*, filed by then Solicitor General Griswold on December 3, 1970, appears a passage which the Court partly incorporated in its opinion:
>
> The district court erred in construing Section 5861(d) as requiring as an element of the government's proof a showing that the transferee obtained possession of a firearm with specific knowledge and intent that the firearm be unregistered. The statute contains no language suggesting the need for such proof, and the history of its predecessors, both in Congress and in the courts, conclusively shows that such a construction has never been thought to be part of the statute, or necessary to save the statute from constitutional doubt. All that the government needs to show is that the individual charged possessed the firearm which was unregistered, *with knowledge that it was a firearm*, and with intent to possess it.

In *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992) (per curiam), the Federal Circuit Court followed *United States v. Anderson* in holding that knowledge was required to be proven to secure violations of § 5861(d). In *Harris*, the defendants were convicted of various firearm violations in connection with narcotics offenses. The Federal Circuit Court interpreted *Freed* as follows:

> *Freed* did not address the question similar to the one raised by our case: suppose the government did not show that the defendant knew the object he possessed was a hand grenade. Surely it is not inconceivable that someone ignorant of weaponry should come into possession of a hand grenade thinking it something entirely different – perhaps an antique projectile fired out

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Given the extremely dangerous character of firearms subject to the Act, it is inaccurate to characterize such a construction as imposing a penalty "for conduct alone without regard to the intent of the doer." *Lambert v. California*, 355 U.S. 225, 228 [78 S.Ct. 240, 242, 2 L.Ed.2d 228 (1957)]. *The very nature of the weapons* is sufficient to apprise an individual possessing them that they are likely to be resulted, and thus is also sufficient to make a failure to inquire as to the lawfulness of the possession culpable behavior in the ordinary sense. Hand grenades are certainly no less dangerous than narcotic drugs, as to which similar penalties have always been found proper. *United States v. Balint*, 258 U.S. 250, 254 [42 S.Ct. 301, 303, 66 L.Ed. 604 (1922)]. . . . The government must show that appellees were in possession of hand grenades, knowingly and intentionally; but it need not show any knowledge or intent on their part that these grenades be unregistered (emphasis added throughout). The same brief also states (p. 25): "To be sure, there must be some evidence of mental state – that the accused *knew he possessed a firearm* and that he intended to be in possession;. . . ." (Emphases added.)

> of nineteenth century mortar. To be sure, the Court describes hand grenades as "highly dangerous and offensive weapons" that put a citizen on notice to "ascertain at his peril" whether possession is regulated . . . But this proposition necessarily assumes that the defendant knew he possessed a hand grenade. . . . If the defendant did not know the object's dangerous properties because he did not know what the object was, the Court's logic does not apply.

Harris, 959 at 260.

In *United States v. Williams*, 872 F.2d 773 (6th Cir. 1989), the defendant sold an AKS Sporting rifle to an undercover agent. An expert determined that the weapon had been converted to a fully automatic rifle by internal modifications. *Williams*, 872 F.2d at 774. Williams was convicted pursuant to 26 U.S.C. § 5861(d). The court noted that *both* parties relied heavily on *Freed* and stated:

> *Freed* presupposes proof of knowledge that one is dealing with an instrumentality from which one can infer that regulation is likely, an observation shared by the court in *United States v. DeBartolo*, 482 F.2d 312 (1st Cir. 1973):
>
> In *Freed*, it is true, that the court assumed that the government would have to prove that the defendant knew the grenade was a grenade, hence a "firearm." Such assumption was expressly stated by Justice Brennan in his concurring opinion. *Williams*, 872 F.2d at 774.

The Ninth Circuit Court of Appeals interpreted *Freed* as follows:

> . . . the court determined that the prosecution did not have to prove that the defendant knew that the hand grenades were unregistered, nor did it have to prove that the defendant knew of the registration requirement. Nevertheless, the statute does require the prosecution to prove some knowledge on the defendant's part. The

> court explained that the prosecution must prove that the defendant knew that the device was a firearm.

See United States v. Kindred, 931 F.2d 609, 611 (9th Cir. 1991). *See also, United States v. Herbert*, 698 F.2d 981 (9th Cir. 1983) and *United States v. O'Mara*, 963 F.2d 1290 (9th Cir. 1992).

Those courts that cite *United States v. Freed* for the holding that § 5861(d) offenses are strict liability crimes fail to provide well-reasoned justification for so finding. For example, in *United States v. Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), the court concludes:

> The offenses with which defendant was charged were not specific intent crimes, and the government was not required to prove either that he knew that possession of the weapon was against the law or that registration of the weapon was required. Citing, *United States v. Freed*, 401 U.S. 601 (1971) (other citations omitted).

Advocates of strict construction of penal statutes believe that the *mens rea* holding in *Freed* spawned a number of dubious decisions and an even larger number of dubious prosecutions. One author opined:

> The overbreadth of the *Freed* opinion invites prosecutors to apply § 5861 not only to persons who did not know of the unregistered status of the dangerous weapons they possessed but also to those who did not even know that they were in possession of dangerous weapons.

Batey, Robert, "Strict Construction of Firearms Offenses: The Supreme Court and the Gun Control Act of 1968." 49 *Law & Contemp. Probs.* 163 (Wint. 1986).

The petitioner respectfully contends that *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992) is one such decision resulting in injustice. Further analysis of judicial decisions advocating strict liability for NFA violations follows.

B. DECISIONS OF THE TENTH CIRCUIT AND OTHER CIRCUIT COURTS WHICH VIEW VIOLATIONS OF 26 U.S.C. § 5861(d) AS STRICT LIABILITY CRIMES

Because of the recency of the federal circuit opinion, the Tenth Circuit may not have had the benefit of the *Harris* decision when it upheld the conviction of the petitioner. The Tenth Circuit Court was "bound" by *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987). In the *Mittleider* decision, enforced and expanded in *United States v. Staples*, 971 F.2d 608 (10th Cir. 1992), the Tenth Circuit Court of Appeals merely pronounced, absent clear reasoning, that knowledge was not a necessary element to secure a conviction for violations of 26 U.S.C. § 5861(d). The Tenth Circuit Court cited no support for this pronouncement – no basis in statutory construction or legislative intent. The reasoning for the *Mittleider* holding is also absent from the Court's opinion.

In *Mittleider*, the defendant, an army AWOL using a false name acquired a semiautomatic J-15 rifle. The gun was later converted to fully automatic and sold by the defendant to an undercover agent. The defendant also sold a semiautomatic AR-15 rifle with a conversion kit to the same agent, who was posing as a survivalist in the market for machineguns. The record indicated that the defendant had ACTUAL KNOWLEDGE that the J-15 rifle had been converted into an automatic weapon. The jury in *Mittleider* was instructed:

> The mere possession of a firearm which is required to be registered and has not been registered is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew that the weapon in his possession was a machinegun within the meaning of the statute or that he knew that registration was required. It is sufficient if you

> find beyond a reasonable doubt that he knowingly possessed it.

Mittleider, 835 F.2d at 774.

The Tenth Circuit Court found that this instruction "contains an accurate statement of the applicable law" because the crimes charged were not "specific intent crimes," citing *United States v. Freed*, supra. *Mittleider*, 835 F.2d at 774.

The evidence which was UNCONTROVERTED at trial in the *Staples* case, and which was omitted from any discussion by the Tenth Circuit Court of Appeals in rendering its decision, was that this AR-15 was defective and fired, if at all, only *semi*automatically during years 1983, 1984, 1985, 1986, 1987, 1988 and 1989 until the government's seizure and possession of the AR-15 for several months *pre-indictment*.[10] The testimony of the petitioner, David Seabolt, Chris Peak, and Brian Jobson, unchallenged by the government, established that the weapon fired *semi*automatically, if at all, and that the defendant had no knowledge of its claimed automatic capability. Hence, Circuit Judge Ebel's statement in the *Staples* concurring opinion is applicable here:

> In cases in which the defendant is truly ignorant of the automatic characteristics of the gun . . . the law as construed in *Mittleider* may lead to draconian results. [*United States v. Staples*, 971 F.2d at 617 (Ebel, J. Concurring)].

Judge Ebel agreed that "this panel by our precedent in *Mittleider*," but wrote separately "because in [his] view the growing trend in the law is to require the government to prove knowledge of the characteristics of the weapon that make its possession a crime." *Staples*, 971 F.2d at 617.

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[10] See the testimony supporting this assertion set forth in the Addendum to the Statement of the Facts.

The conviction of the petitioner was based upon an alleged modification of a selector switch on the AR-15. This modification does not, by itself, permit the AR-15 to fire more than one shot with a single trigger pull. Under the holding in *United States v. Mittleider*, 835 F.2d 769 (10th Cir. 1987), this modification becomes the *sole* consideration in the instant case as to whether this AR-15 is a "dangerous device of such type that would alert one to the likelihood of regulation." However, under *Mittleider*, the government need not prove that the defendant knew of the weapon's automatic capabilities, i.e. the government need not prove that the defendant knew that the AR-15 selector switch was filed or worn down. In the opinion in this case, however, the Tenth Circuit Court goes one step further and states that *the defendant* should have presented evidence proving *when* the switch was filed off further abrogating the burden of proof which is borne by the government. *See United States v. Staples*, 971 F.2d 608, 611, (10th Cir. 1992).

In *Staples*, the Tenth Circuit Court stated:

> The uncontested testimony at trial of ATF Agents Ward and McLaughlin was that the weapon's selector switch located on the exterior of the receiver, could be turned to the automatic fire position and that there was a shiny spot on the receiver indicative of tampering.

United States v. Staples, 971 F.2d at 613 (10th Cir. 1992).

The petitioner raised the issue at trial of when the selector switch was allegedly filed through the testimony of Robert Yerton. Officer Yerton took photographs of the AR-15 on December 13, 1990, after the gun had been in the government's possession, specifically at the ATF laboratory, for almost one year. Officer Yerton admitted that there could be metal filings next to the weapon which would indicate a *recent* grinding of the selector switch. This testimony contradicts the statements of the ATF

agents relied upon by the Tenth Circuit and Officer Yerton's uncontroverted testimony was raised at the first opportunity in Tenth Circuit appeal.

Further, as stated above, the Tenth Circuit has required by its decision that *the defendant* prove when the stop was filed off. The appellant respectfully contends that this requirement is beyond *Mittleider*. However, the petitioner did present evidence on this issue and the petitioner testified at trial as follows:

> Q. Now, sir, I want you to pick up Government's Exhibit Number 2 once again and hold it. I want to direct your attention to the left side of the receiver where there's a little tiny spot by the selector switch. Now, I want you to explain, if you can, to the ladies and gentlemen of the jury what caused that.
>
> A. I don't ever recall the gun, this being there. Of course, its been several years since I've seen it, but I don't ever recall this being there.
>
> Q. Did you request an opportunity to see the items taken from your home before they were taken by the agents?
>
> A. Yes, sir, I did.
>
> Q. Did they allow you to do so?
>
> A. No, sir.

Consider this testimony together with the trial testimony of ATF Agents Ward and Sprague. ATF Agent Lowell Sprague testified that he photographed all seized evidence at the Staples' garage on December 29, 1989, but did not testify concerning the condition of the selector switch. Agent Sprague's photos were not introduced in the government's case. (Tr. pp. 30-34, Aplt. App. #R, pp. 412-416). ATF Agent Ward testified that "when he saw- . . . the receiver of this weapon . . . he saw a dot on the side of the receiver [and] . . . indicated that the post had been grinded off to go into fully automatic position." [Tr.

pp. 39-40, Aplt. App. #R, pp. 381-382]. ATF Agent Blair failed to testify as to when he saw the weapon in a state where the stop had been filed off. Further, ATF Agent McLaughlin testified that there was a "shiny spot" over the selector switch, and his "educated guess" was that "*someone* had taken a saw or possibly a file or a grinding tool to [the switch] and removed it." (Tr. pp. 101-102, Aplt. App. #Q, pp. 291-292). **Thus, the government wholly failed to establish when the selector switch was allegedly ground off, and utterly failed to link that alleged act to the petitioner.**

This Court must consider what is required of a citizen when faced with this predicament. The petitioner testified that he did not modify the weapon, the government failed to prove who modified the AR-15 and when it was modified. It was also established at trial, that with the exception of a few weeks prior to seizure, the weapon had been possessed by the petitioner's nephew for a period of years. (Tr. p. 291, Aplt. App. #L, p. 207). The petitioner was further denied the opportunity to view the seized evidence. The government indicted him seven months later for failing to register this allegedly modified AR-15. Photographs taken of the weapon months after seizure show metal filings evidencing a RECENT grinding of the switch. The petitioner respectfully agrees with Judge Ebel in that it is truly draconian that this set of circumstances resulted in conviction. *Staples*, 971 F.2d at 617.

* * *

The petitioner's conviction would have been upheld in the First, Fourth, Seventh and Eighth Circuit Courts of Appeal. *United States v. Shilling*, 826 F.2d 1365 (4th Cir. 1987) was relied upon heavily by the Tenth Circuit Court

in the *Mittleider* opinion. However, in *Shilling*, the defendant possessed some fifty guns, ten of which were originally legal semiautomatic rifles that had been internally altered. Shilling possessed a pen gun, a silencer and a short-barrelled rifle, and was charged with narcotics offenses. There was "substantial" circumstantial evidence presented that Shilling knew that his weapons were converted. The circuit found that *Morgan v. United States*, 564 F.2d 803 (8th Cir. 1977) was instructive and persuasive and, therefore declined to find that the National Firearms Act required any specific intent to secure conviction.

In *Morgan*, the defendant was found guilty of possessing an unregistered Colt M-16 machinegun. In 1977, when *Morgan* was decided, the interpretive repercussions of the Gun Control Act had not been realized. Furthermore, the circuit courts of appeal which had decided this issue at the time of Morgan's appeal all agreed that violations of § 5861(d) were strict liability crimes. In *Morgan*, the court cited this Court's *Freed* decision in support of their holding:

> In *United States v. Freed*, 401 U.S. 601 (1971), the Supreme Court concluded that the Act required no specific intent or knowledge that the weapons possessed were unregistered. "The Act makes it unlawful for any person 'to receive or possess a firearm which is not registered to him.'" (Footnote omitted). . . . the Supreme Court added: By lower court decisions at the time that requirement was written into the Act, the only knowledge required to be proved was knowledge that the instrument possessed was a firearm. Citing *Sipes v. United States*, 321 F.2d 174 (8th Cir. 1963).

The 1973 decision of *United States v. DeBartolo*, 482 F.2d 314 (1st Cir. 1973) relies on *Freed* and on this Court's decision rendered in *United States v. International Minerals*

Corp., 402 U.S. 558 (1971) in holding that violations of the National Firearms Act were strict liability crimes. In *DeBartolo*, the Court stated "one knowingly participating in the sale of such a lethal instrumentality cannot escape liability by failing to inspect the length of its barrel any more than by failing to inquire whether it is registered." *DeBartolo*, 482 F.2d at 316. The unregistered weapon which DeBartolo possessed was a sawed-off shotgun. Defendant DeBartolo was no stranger to firearms – he dealt in guns, owned a skeet range, tested and repaired guns and rifles. The court relied on this statement from *International Minerals* to affirm *DeBartolo's* conviction:

> But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation. *DeBartolo*, 482 F.2d at 316.

Unlike DeBartolo, Shilling and Morgan, the petitioner before this Court does not deal in weapons, did not possess fifty guns, nor was his weapon seized in connection with illegal drug activity. The item seized was an AR-15 sport rifle, bought at the public gun show held annually in Tulsa, Oklahoma. The flaw in reasoning in the First, Fourth, Seventh, Eighth and Tenth Circuits is that they fail to differentiate between persons such as the petitioner who have no felony convictions and who was totally unaware of the automatic capability of his "firearm" as opposed to persons such as defendant Mittleider or Shilling who were dealing in weapons and/or narcotics and who clearly *knew* of the automatic capability of their weapons. As Judge Ebel stated in his concurring opinion of the *Staples* decisions:

> Consider, for example, a situation in which a person who knows nothing about guns inherits

a rifle from a relative. Unbeknownst to the recipient, the gun is defective and occasionally discharges two rounds of ammunition after a single pull of the trigger, or perhaps it has been converted by a prior owner into an automatic weapon. Because he has no use for the rifle, the recipient stores it with other unnecessary possessions in his basement or attic without having ever used it or indeed even examined it. Under *Mittleider*, that person may be prosecuted and convicted for violation of 26 U.S.C. § 5861 and may receive a sentence of twenty-seven to thirty-three months' imprisonment. *See U.S.S.G.* § 2K2.1(a)(5).

Judge Cook, the trial judge in the instant case also expressed concerns over conviction of innocent possessors of malfunctioning guns:

> THE COURT: . . . Your example given of a person out there duck hunting, and the gun happens to fire twice when he pulls it once because it's an automatic loading gun as distinguished from an automatic firing gun, why, that's what you've been saying.[11]
>
> MR. BREWSTER: Correct. You are correct.

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[11] The example by Mr. Brewster was stated at a pre-trial motions hearing:

> If I shoot my Browning .22 at a rabbit tonight and it doubles, I'm in possession of a machine gun. I cannot register it. What do I do? That is a ludicrous position that a person is placed in. And I'm suggesting to Your Honor that the law is that it has to fire automatically more than one shot. Congress wasn't redundant without a reason. It wasn't more than one shot with a single pull of the trigger. It's automatically more than one shot. (Transcript of proceedings, 12/13/90, pp. 14-15, Aplt. App. #J, pp. 138-139).

> THE COURT: What's the guy do? Shoot at a duck, it shoots twice, and he suddenly has become a felon.
>
> MR. BREWSTER: Not registerable.
>
> THE COURT: Well, it may or it may not be. I don't know. I'm not going to say that. But that's disturbing, because our sense of fair play to people. And it may be that the sense of fair play was such that the Congress just assumed that while it technically is a violation, the ATF wouldn't prosecute them.

One author had the following comment with regard to overzealous enforcement of gun control legislation:

> The criminal provisions of the 1968 Act are complex overlapping, and frequently technical. Unfortunately, in such a legislative scheme, federal agents and prosecutors can easily find opportunities for harassment and intimidation of the firearm-holding populace. Batey, Robert, "Strict Construction of Firearms Offenses: The Supreme Court and the Gun Control Act of 1968" 49 *Law & Contemp. Probs.* 163 (Wint. 1986). *Citing*, Staff of Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d. Sess., "The Right to Keep and Bear Arms" (Comm. Print 1982.) ("it is apparent that enforcement tactics made possible by current federal firearms laws are constitutionally, legally, and practically reprehensible").

The impact of the disparity in prosecutions was the focus of some of the legislative debate set forth herein. The words of Congressman McClure in 1986 are particularly enlightening: "crime cannot be controlled by attacking an inanimate tool." Further, as stated in the most recent decision of *United States v. Harris, supra*, "It may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of

only certain kinds of firearms that it thought were highly dangerous." *Harris*, 959 F.2d at 259.

C. *LEGISLATIVE INTENT*

In order to resolve this issue, a careful analysis of the legislative intent is required. As this Court stated in *Dowling v. United States*, 473 U.S. 207, 213:

> Federal crimes, of course, "are solely creatures of statute." (citations omitted.) Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids.

The statutory provisions at issue in this case are set forth at pages 1-3. 26 U.S.C. § 5845 was amended in 1986, as part of the Firearms Owner Protection Act (PL-99-308). The legislative history is replete with comments regarding the legitimate use of sport rifles and the right to bear arms for self-protection. It is clear from even a cursory view of the legislative history that the intent of the National Firearms Act was to prevent violent crime and drug trafficking among the so-called "criminal element" in American society.

During the debate process for the 1986 Amendments to the National Firearms Act, Congressman McCollum stated:

> Throughout the amendment process, this body will work its will and develop a balance between the basic American right to bear arms and the freedom of sportsman on the one hand and adequate law enforcement on the other. I **sincerely hope that we can establish a firearms law that is directed at the criminal elements in society rather than law abiding citizens.** 132 Cong. Rec. H1658 (daily ed. April 9, 1986).

Section 101 of the Gun Control Act of 1968 similarly states:

> it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession or the use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law abiding citizens for lawful purposes.

During the Senate debate regarding the Firearms Owner Protection Act, which includes 26 U.S.C. § 5845(b), the following dialogue occurred:

> Mr. HATCH. Mr. President, before I cast my vote in favor of this bill, I have a further question which concerns the definition of parts for a machinegun. *The language of the bill is clear, but a member of my staff has pointed out that the description of this provision on the floor of the other body could cause it to be misinterpreted, with potentially serious consequence to those who own semiautomatic firearms which contain machinegun parts,* or those who own legally registered machineguns and possesses parts for use in repair or maintenance.
>
> Section 109 of the bill adds to the present definition of a machinegun, which includes as a registerable item "any combination of parts designated and intended for use in converting a weapon into a machinegun." The new language of the bill adds: "any part designed and intended solely and exclusive * * * for use in converting a weapon into a machinegun."
>
> Clearly the operative words are "for use in converting." The only reason I mention this is that the maker of the motion in the other body

described it somewhat ambiguously as including "a 'part' that is intended solely and exclusively for a machinegun." That is not what the bill says, and it is of great importance to many law abiding citizens that it be interpreted exactly and so clearly and unambiguously written . . .

Mr. HATCH. In other words, the mere fact of possession of a single part designed for a machinegun would not require registration and payment of the transfer tax unless that single part would of itself be capable of converting a weapon to a machinegun?

Mr. McCLURE. The Senator is correct. Only if an individual possessed a single part or combination of parts with which conversion could be accomplished with the part or parts would part or parts be subject to the transfer tax. . . .

Mr. McCLURE. Mr. President, make no mistake. I believe that the second amendment means exactly what it says. I believe that our forefathers intended for all honest citizens to be able to arm themselves. This is not a privilege meted out by the Government – it is a sovereign right, belonging to the people themselves.

I also believe that attempts to control violent crime by nibbling away at this right are doomed to fail.

The Gun Control Act of 1968 was more than a nibble – it was a big bite. This may come as a surprise to many, but I share the intention of Congress in passing that law. *All of us want to wipe out violent crime. Unfortunately, the 1968 act did not achieve that goal. This is not surprising. Crime cannot be controlled by attacking an inanimate tool.*

The Firearm Owners Protection Act is a complicated bill – it amends a complicated law. This is

part of the problem. In an attempt to control the possession, transportation and sale of firearms, Congress and the enforcing agency developed a tangle of redtape. The end result has been the entrapment of otherwise honest people into violations that neither hurt anyone, nor contribute to violent crime. The aim of the Firearm Owners Protection Act is to redirect law enforcement toward the kind of transaction most likely to be a factor in violent firearms crime. In other words, we have to stop going after the guy who transposes a number in a zip code, and go after the dealer who is knowingly selling stolen guns, or knowingly selling to prohibited persons.

Briefly, the following are the main points of the bill. . . .

Mandate an element of criminal intention for prosecution and conviction of Federal firearms law violations.

132 Cong. Rec. S5363 (daily ed. May 6, 1986). (Emphasis Added.)

Thus, this discussion clearly supports the testimony of the defense experts at petitioner's trial that the filing of the selector switch, in and of itself, does not make this AR-15 a machinegun subject to registration. The selector switch is not the conversion kit for this AR-15. The *autosear* is the conversion kit and it was plainly established at trial that this sport rifle was not equipped for an autosear. The passion behind the 1986 amendments to the Gun Control Act was fueled by the abuse of civil liberties "perpetrated against real people" by law enforcement. Examples of such cases are cited during the legislative debates. By Congressman Volkmer:

> Let's talk about David Moorhead, a decorated and disabled Vietnam Veteran. Moorhead's gun shop, located in a small New Hampshire town, was visited by an undercover agent who asked

if Moorhead would make an illegal sale. Moorhead instead noted his auto license plate and called ATF to report the man. But the informant saw in Moorhead's shop an M-14 which Moorhead had bought from a boy scout leader and kept as a memento of his service. Although the gun was semiautomatic, ATF's experts felt it was originally designed to work, if fitted with extra parts, as a machinegun. ATF sent a team of agents to raid the shop and take Moorhead into custody on felony charges. Following their policy of involving local officials in a search party, the agents had taken the county Sheriff with them. But the Sheriff immediately agreed to become a character witness for Moorhead.

At the trial, the prosecution argued that good faith was no defense. Moorhead should be subject to 10 years' imprisonment for an honest act. Judge Bownes, since elevated to the circuit, had the courage to dismiss the case. From the bench, he asked Moorhead to stand. The Judge apologized to him on behalf of the United States, calling the case a travesty. Moorhead, who at this point was indigent, was still being sued by ATF for license revocation and forfeiture of the rifle. Under these pressures, he finally gave up his gun shop. 132 Cong. Rec. H1651 (daily ed. April 9, 1986).

Abuses such as David Moorhead and the petitioner before you are likely to continue when prosecutorial bodies are armed with ambiguous legislation which carry burdensome penalties.

D. *APPLICATION OF CONGRESSIONAL INTENT BY CIRCUIT COURTS HAS CAUSED A RECENT TREND REQUIRING PROOF OF KNOWLEDGE THAT THE ITEM POSSESSED IS A "FIREARM"*

This legislative history, in part, inspired the Fifth Circuit Court of Appeals to overturn its own precedent in *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989) *(en banc)*.[12]

On rehearing *en banc*, the Fifth Circuit Court of Appeals stated in the *Anderson* decision:

> Countless numbers of semiautomatic weapons stand in the closets and gun cabinets of this land. Several of the most popular shotgun models, many handguns, and not a few rifles are autoloaders; and either wear and tear or a simple operation can convert any of these from a firearm in the ordinary sense into a "firearm" in the sense defined by the Act. Where, as here, the criminal charge is that of possessing such an arm – one that looks like only a firearm but is in fact a "firearm" – we conclude that a conviction should require that the charged party knew it was a "firearm" in the *Act* sense, not that he (or she) merely knew it was a firearm. . . .
>
> We overrule *Vasquez*, under which innocent possession of a worn or altered autoloader can result in jail time. Such a rule is unjust and dangerous, and there is little if any need for it. For in most cases, as in this one, *mens rea* will be provable if it exists.
>
> * * *
>
> *It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens*

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[12] The predecessor decision of *United States v. Anderson* is reported at 853 F.2d 313 (5th Cir. 1988).

> *to a possible ten-year term of imprisonment if – unknown to them, and without reasonable cause on their part to think otherwise – what they genuinely and reasonably believed was a conventional semi-automatic pistol turns out to have worn down into or been secretly modified to be a fully automatic weapon.*

Anderson, 885 F.2d at 1251, 1254, 1255. (Emphasis added.)

In *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992) (*per curiam*), the Court of Appeals agreed with the reasoning of the *Anderson* court as well as that of the Sixth and Ninth Circuits. In *Harris*, the defendants were convicted of various charges in connection with narcotics offenses. The defendants were convicted pursuant to 26 U.S.C. § 5861(d) (the statute at issue in the instant case) and 18 U.S.C. § 924(c). Section 924(c) makes it a separate offense to use a firearm in connection with a drug trafficking offense, increasing the penalty drastically if the weapon is a machinegun. *Harris*, 959 F.2d at 257. The court stated:

> In prosecutions under § 5861(d), unlike those under § 924(c), the defendant is not necessarily someone who has already been proven to have engaged knowingly in criminal behavior with the very gun in question. Instead, it might be any person who has come into possession of an automatic weapon, and who quite possibly has no reason to be aware that the weapon is a 'firearm' within the meaning of the statute.

Harris, 959 F.2d at 259.

The Harris court stated with regard to congressional intent:

> It may well be that all guns of whatever kind are dangerous, but Congress decided to require registration of only certain kinds of firearms that it thought were highly dangerous. Were we to accept the government's argument that so long as a defendant has knowledge that he possesses

> a gun of any type, the defendant is absolutely liable for possessing a proscribed "firearm," we would implicitly expand Congress' negative judgment concerning the possession of certain particularly dangerous guns to all guns. . . .
>
> We believe that if Congress, against the background of widespread lawful gun ownership, wished to criminalize the mere unregistered possession of certain types of firearms – often indistinguishable from other, non-prohibited types – it would have spoken clearly to that effect. We do not see how the line between the individual who knowingly possesses a gun of some kind but not a firearm within the meaning of the statute and an individual who possesses a "firearm" not even realizing it is a gun.

Harris, 959 F.2d at 259, 260. The facts presented at trial of the petitioner, and set forth herein, show that the petitioner did not know, nor did he have reason to believe, that he possessed a "firearm" as that term is defined within the National Firearms Act. The petitioner respectfully urges this Court to follow the trend of recent circuit court decisions which require the government to prove that the defendant knew he possessed a "firearm" within the meaning of the Act.

E. THE COURT SHOULD APPLY THE RULE OF LENITY

The petitioner respectfully urges this Court to apply the "rule of lenity" in interpreting 26 U.S.C. § 5861(d). Strict statutory construction of penal laws is tradition in this Court. In *Dowling v. United States*, 473 U.S. 209 (1985), Justice Blackmun quoted Chief Justice Marshall's words expressed in 1820 which sets forth the basic rationale for the rule of lenity:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820).

In *Liparota v. United States*, 471 U.S. 419 (1985), the defendant was charged with violating 7 U.S.C. § 2024(b)(1). That statute penalizes knowing uses of food stamps in any manner not authorized by statute or regulation. This Court applied the rule of lenity and reversed the defendant's conviction. In so reversing, the Court stated that criminal offenses requiring no *mens rea* have a generally disfavored status:

> The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute. *United States v. Hudson*, 7 Cranch 32 (1812). With respect to the element at issue in this case, however, Congress has not explicitly spelled out the mental state required. Although Congress certainly intended by use of the word "knowingly" to require *some* mental state with respect to *some* element of the crime defined in § 2024(b)(1), the interpretations proffered by both parties accord with congressional intent to this extent. . . .
>
> **In addition, requiring *mens rea* is in keeping with our long-standing recognition of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."** *Rewis v. United States*, 401 U.S. 808, 812 (1971). See also *United States v. United States Gypsum Co., supra*, at 437; *United States v. Bass*, 404 U.S. 336, 347-348 (1971); *Bell v. United States*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). **Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.** See *United States v. Bass, supra*, at 348 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). Although the rule of lenity is not to be applied where to do so would conflict with the implied or expressed intent of Congress, it provides a time-honored interpretive guideline when the congressional purpose is unclear.

Liparota, 471 U.S. 424, 427. (Emphasis added).

In the recent United States Supreme Court decision of *United States v. Thompson/Center Arms Company*, ___ U.S. ___, 112 S.Ct. 2102 (1992), this Court applied the rule of lenity to interpret an ambiguous statute. Thompson/Center was required by the ATF to pay a $200 tax pursuant to 26 U.S.C. 5861 for "making" a "firearm." Thompson/Center manufactured the "contender" pistol and, for a short time, manufactured a conversion kit which shortened the barrel of the pistol arguably making it a "firearm" as defined by 26 U.S.C. 5845. At the outset, this Court stated that "the word 'firearm' is used as a term of art in the NFA."[13] This Court also stated:

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[13] Accord, *Anderson*, 885 F.2d at 1251, where the court found that a "firearm" as that term is used in the NFA:

> bears little if any correspondence to that in common usage, much as though the word "animal" were defined in some suppositious National Zoo Act to

> It is of course clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes, just as the regulation of short barrelled rifles, for example, addresses a concealable weapon likely to be so used.

Thompson/Center, 112 S.Ct. at 2109.

Because Thompson/Center's actions may be subject to criminal sanction and because the statute was ambiguous, the rule of lenity was applied to resolve the ambiguity in Thompson/Center's favor. *Thompson/Center*, 112 S.Ct. at 2101. As Justice Stevens states in his dissenting opinion:

> The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous punitive statutes. Obviously, citizens should not be subject to punishment without fair notice that their conduct is prohibited by law.

The *Staples* jurors were instructed that an element of this offense was **knowing** possession of the firearm described in the indictment." Although § 5861(d) is silent as to the element of knowledge, this statutory silence on the issue of *mens rea* is not determinative. This Court has stated:

> Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement. . . . the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law.

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exclude all mammals, reptiles and birds, except lions and tigers, but to include freight trains, teddy bears, feather boas and hall trees.

United States v. United States Gypsum Co., 438 U.S. 422, 438 (1977); *Liparota v. United States*, 471 U.S. 419, 426 (1984).

The rule of lenity, if applied in this case, should lead to a reversal of the conviction of the petitioner. If the prosecutor is required to prove, beyond a reasonable doubt, that the petitioner has knowledge of the qualities of his weapon which make it a "firearm" within the meaning of § 5845 and § 5861(d), the petitioner respectfully submits that a trial would result in a judgment of acquittal. It is clear in this case that this petitioner had no idea that his AR-15 sport rifle could malfunction to produce multiple shots. Further, the petitioner did not know nor did he have reason to know that the stop had been filed or worn down. More importantly, the government wholly failed to prove *when* the stop was filed down or that the petitioner filed the stop.

The rule of lenity would have been applied in *United States v. Anderson*, 853 F.2d 313 (5th Cir. 1988) by the Fifth Circuit had it not been bound by precedent. The Court stated:

> We believe that as a matter of statutory construction, requiring some degree of knowledge of the *facts* that make a weapon a "firearm" within the meaning of the Act is preferable to not requiring such knowledge. The recent case of *Liparota v. United States*, 471 U.S. 419 (1985) is instructive on this point. In *Liparota*, the Supreme Court addressed the issue of whether in a prosecution for unauthorized acquisition or possession of food stamps, under 7 U.S.C. Sec. 2024(b)(1) "the government must prove that the defendant knew that he was acting in a manner unauthorized by statute or regulations." [In answering in the affirmative] the Supreme Court reasoned that "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct. The Court also noted

> that "requiring *mens rea* is in keeping with our long-standing principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' "

Anderson, 853 F.2d at 318, 319.

The petitioner respectfully urges this Court to apply the rule of lenity and resolve the ambiguity present in 26 U.S.C. § 5861(d) and § 5845 in favor of the petitioner.

CONCLUSION

For the above reasons, petitioner respectfully urges this Court to reverse the court of appeals judgment and reverse the conviction of the petitioner.

Respectfully submitted,

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